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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re D.M., et al., Persons Coming Under
the Juvenile Court Law.

B213315
(Los Angeles County
Super. Ct. No. CK 23656)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

J.M.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County.

Jan G. Levine, Judge. Affirmed.

Amy Z. Tobin, under appointment by the Court of Appeal, for Defendant
and Appellant.

James M. Owens, Assistant County Counsel, and O. Raquel Ramirez,
Deputy County Counsel, for Plaintiff and Respondent.

J.M., the father of twins D.M. and J.M., appealed from the order made at a contested 18-month review hearing pursuant to Welfare and Institutions Code section¹ 366.22. Father contends there was insufficient evidence to support the court's finding the children could not safely be returned to his custody. We affirm as father's unresolved anger management issues support the court's finding.

FACTUAL AND PROCEDURAL SYNOPSIS

I. Detention

A. Prior Juvenile Court History

There had been nine prior child abuse hotline referrals involving this family and a prior court involvement as to half-siblings. One referral involved substantiated allegations of general neglect of the twins resulting in additional court involvement in February 2005. In August 2006, the court allowed the twins to be returned to their parents, and they initially spent equal time at each parent's residence. The parents reconciled in November 2006. The court terminated jurisdiction in February 2007.

B. The Petition²

The family again came to the attention of the Department of Children and Family Services (Department) as the result of a new child abuse hotline referral based on a physical altercation between mother and father on April 27, 2007. Father and mother were not living together. Mother denied the children were present, but father and his roommate said the incident occurred in front of the children. The children said both

¹ All statutory references are to the Welfare and Institutions Code.

² The petition was filed on behalf of mother's five children, but this appeal only concerns the twins.

parents were violent with each other, mother said they only pushed each other, and father and his roommate denied father was violent with mother.

Another incident of domestic violence occurred in April, after which mother obtained a temporary restraining order (TRO) against father. The TRO indicated mother had sustained a black right eye and bruises on her arms. Half-sibling N. told the social worker (CSW) that she saw father trying to suffocate mother with a pillow.

Both parents had drug-related criminal histories. Father had prior arrests for carrying a concealed weapon, possession of a controlled substance while armed, inflicting corporal injury on spouse/cohabitant, and a felony parole violation in August 2005 for carrying a knife.

Father told the CSW he had last used marijuana in 2003. N. said she saw father smoke marijuana sometime in 2007, and she found a plastic bag of marijuana in his pants pocket on another occasion.

The maternal grandmother informed the social worker she was concerned for her grandchildren as father was very violent, he was an angry person, and he had threatened to kill mother, which maternal grandmother was afraid father eventually would do. Maternal grandmother said the children had been having nightmares due to the most recent incident of domestic violence.

The Department took the children into protective custody; they were detained with maternal grandmother. The Department filed a section 300 petition on behalf of the children alleging the parents had a history of domestic violence, mother had a history of substance abuse and was a current user of alcohol, and father had a history of substance abuse and was a current user of drugs.

C. Hearings

Father's attorney asked the court to release the children to father's custody or consider placing them with the paternal grandmother. The court ordered the children

would remain detained from both parents and allowed the parents monitored visits. The court ordered the Department to provide the parents with referrals for domestic violence counseling, individual counseling and weekly random drug testing.

The Department recommended against placing the children with mother at her temporary shelter and reported it had not assessed paternal grandmother's home as she had been convicted of second degree burglary, which was a non-exemptible offense, barring placement of the children with her. Paternal grandmother had numerous other misdemeanor and felony convictions and was on parole. The court declined to place the children with paternal grandmother or mother.

D. Conference and Mediation

On June 6, 2007, the Department held a team decision making (TDM) meeting to discuss placement issues. Before the meeting, foster mother encouraged the children to say hello to father when they arrived, while maternal grandmother instructed the children to come to her. Father yelled at maternal grandmother, and when she did not respond, he stated, "You're on my turf now." The CSW observed the children were visibly upset. Maternal grandmother was escorted out of the building after the meeting because she was fearful of father.

According to foster mother, father was hostile, profusely angry, and irrational during the meeting. Father directed most of his anger toward maternal grandmother and foster mother, but he was also angry toward the meeting facilitator. At one point, father became so hostile and unmanageable the facilitator suggested father spend the remaining 45 minutes visiting the children. At the meeting, it was determined the children would be detained with foster mother.

The CSW reported she had received a telephone message from father on June 9 indicating he was leaving approximately 20 minutes into his two hour visit, stating he did not want to deal with the "punk mother fucking bitch" and her "bullshit." Father said

he had tried to call foster mother prior to the visit, but she did not answer the phone. Father told the CSW that Saturday was the only day he could visit as he worked every other day.

On June 9, the CSW also received a telephone message from foster mother explaining father had left the visit after asking her in front of the children why she had not answered her telephone. Foster mother said she had not received a call from father, and she directed him to spend the time during the visit with the children. Foster mother said the children cried and were confused and upset when father left and the visit ended.

Father told the CSW that he was the victim and he wanted his children returned to him. The Department acknowledged father previously had completed a batterer's program in July 2001 and a parent education program in October 2005, but observed he had not utilized the tools he learned to avoid becoming involved in violent relationships. The Department recommended the children not be returned to father's custody until he addressed his issues of domestic violence and anger management.

After a mediation, the court sustained the counts on the history of domestic violence and mother's history of substance abuse, but reserved a finding on count b-3 (father's history of substance abuse) until the next court date. The court declared the children dependents, removed the custody of the children from the parents and ordered family reunification services for both. Father's services included counseling for domestic violence and anger management.

II. Adjudication/Disposition

Mother obtained a permanent restraining order against father on May 22.

At the hearing, the court acknowledged the parties had agreed count b-3 would be stricken from the petition. The court ordered father to submit eight random drug and alcohol tests and attend individual and anger management counseling. Father's attorney indicated father was participating in an anger management group. The court ordered

monitored visits for the parents and gave the Department discretion to liberalize visitation.

III. Review Hearings

A. 6-Month Review

In June and July 2007, mother enrolled in a domestic violence program and a residential drug treatment program. Mother gave birth to a boy in November. The baby had significant medical needs. Mother was allowed unmonitored, overnight visits with the children.

Father enrolled in an anger management program in August, but he attended only three classes claiming he was unable to continue the program due to his work schedule. Father told the CSW he did not know why he had to do the things ordered by the court because mother was the person who had hit him. As of January 2008, father had not provided any additional information regarding his compliance with an anger management program. The Department was concerned that father was not taking any responsibility for his part in the domestic violence that led to the detention of the children. Father also had not provided any information regarding his participation in individual counseling. The Department noted father was not in compliance with that part of the case plan.

Mother had the approval of her drug treatment program to move into a new apartment on February 28. The court ordered unmonitored, weekend, overnight visits for mother. Father continued to have monitored visits on Saturday afternoons

At the hearing, the court found the parents were in partial compliance and ordered reunification services continue. The court reiterated father was to participate in domestic violence counseling, individual counseling and weekly random drug testing.

B. 12-Month Review

Father told the CSW he was participating in individual counseling and random drug testing, but he continued to express confusion over having to attend the court-ordered programs as he was the victim not the perpetrator of the domestic violence. In June, father completed a 10-week anger management program.

The CSW visited father at the apartment he shared with his mother and monitored his visits with the children at a local park. The CSW observed father ate and played with the children, and they interacted well with each other. Foster mother confirmed father ate with the children when she monitored their visits, but stated he never called during their non-visit time.

By the June TDM meeting, both parents had made some progress, but they had not completed their programs. It was agreed the children would remain with foster mother and father would begin unmonitored visits. The Department recommended father's visits be contingent on his providing proof of eight clean, consecutive, random drug tests.

The children told the CSW they loved mother, father and foster mother, but they wanted to live with their foster mother; they got scared of their parents when their parents were angry and were afraid when father yelled.

The Department concluded that father had not fully accepted his part in the domestic violence that had occurred between him and mother and that returning the children to his care would place them at high risk.

At the July hearing, the court found it was not in receipt of the required drug tests and warned father that if he had to do a drug treatment program, he was running out of time. The court also indicated the 18-month statutory date for the end of family reunification services was in November.

By the August contested hearing, mother had completed her one year residential program and voluntarily enrolled in another individual counseling program.

The director of father's program told the CSW that he could not locate all of father's drug test results and that father had not submitted to eight random tests due to problems with the lab they were using. The Department recommended father continue to have only monitored visits until he submitted the required test results.

At the hearing, the court found both parents were in partial compliance and ordered reunification services to continue. The court modified the case plan and ordered father to submit to random drug testing two times per month and allowed him to continue to test at his current site. The court ordered unmonitored visits, including overnights, for father and unmonitored, but not overnight, for mother.

C. 18-Month Review

1. November Hearing

By September, mother, who had completed a 52-week domestic violence batterers program, continued to attend weekly individual counseling and to submit to random drug testing.

Foster mother reported when the children returned from a weekend visit with father, D. told foster mother she had a burn on her arm from where father had accidentally burned her with a cigarette. Father told the CSW he had accidentally burned D. when she ran into him and he did not seek medical attention or apply cream to the burn because she appeared fine and did not complain of pain.

In October, the children told the CSW that they had seen father fighting with his neighbor Traci; father and Traci yelled and screamed, and the children heard many bad words. Father denied having a physical fight or heated argument, but admitted he had screamed at Traci because she behaved inappropriately and used bad language in his apartment. D. stated she saw father kiss, hug and sleep with his girlfriend. Father denied having sex in the presence of the children, but stated he kissed and hugged his girlfriend in the apartment.

Both children said they did not want to live with mother or father, rather they wanted to live with their foster mother; they were uncomfortable with and afraid of father, especially when he screamed. D. said she did not want to have overnight visits with father.

Based upon the recent incidents, the CSW suspended father's visit for the weekend of October 4 and informed father a TDM meeting had been scheduled to discuss the incidents and address the safety of the children during future visits. Father became very angry and extensively cursed at the CSW, who hung up the telephone as father continued his abusive verbal outburst, refused to calm down and persisted in cursing.

At the TDM meeting, father admitted he had sex with his girlfriend because he thought the children were asleep, he had engaged in a verbal altercation, including yelling, with Traci in front of the children because Traci had threatened to harm another woman who had slept with Traci's boyfriend. The consensus of the team was father could resume his visits with a safety plan in place. The plan included: father was to be more cautious with respect to exposing the children to sexual activity; he was to report all incidents concerning the children to the CSW immediately, and he was to be more cautious when having loud conversations around the children that might frighten them.

The CSW reported father continued to exhibit volatile and violent behavior. On at least five occasions, father yelled, cursed, and threatened the CSW. Foster mother indicated that on two or three occasions, father used inappropriate words, yelled at her, and was very irate when he spoke with her on the telephone.

Father had an incident of domestic violence with his girlfriend in April that led to police intervention. The police report indicated the girlfriend had been living with father for five months; on April 19, father and the girlfriend began to argue because she was looking for a new place to live and was breaking up with him. Father lunged at the girlfriend and pushed her into the stair railing. The girlfriend tried to run into Traci's apartment, but father opened the door, grabbed the girlfriend by the arm and pushed her onto the sofa. Father then jumped on the girlfriend and started to choke her with both

hands. The girlfriend, who was very intoxicated and changed her story numerous times, declined to prosecute.

The Department was concerned father had not applied what he had learned in his domestic violence program. Father appeared to have a serious problem controlling his anger. After completing a risk assessment, the Department concluded returning the children to father's care would place them at high risk and recommended the court order the children returned to mother and father's family reunification services be terminated.

At the November hearing, the court ordered the children returned to mother, with family maintenance services. The court continued the matter for a contested hearing as to father only.

2. December Hearing

In December, the children told the CSW they did not want to visit with father on the weekend because they mostly played video games with him; they said they wanted to live with mother. The children stated that on at least three occasions, their paternal grandmother cared for them because father went to visit Traci and that on at least two or three occasions, Traci cared for them because father went out. They were afraid of staying with Traci because she threatened to kill them if they did not listen to her. J. said Traci tried to hit him a few times, but missed. D. said Traci tried to hit her buttocks two or three times, but it did not really hurt. Father taught the children a song that involved showing the middle finger to mother.

Father said the children enjoyed their visits with him because they had many friends in his apartment complex. Father denied the children stayed unsupervised with the paternal grandmother or Traci and said he did not allow them to be alone with anyone during their visits. The CSW reminded father the children could not be left alone with the paternal grandmother or Traci due to their criminal records.

The court held the contested hearing on December 15 and 16.

a. Department Witnesses

The maternal grandmother testified both children told her that father had sex with his girlfriend on the floor in front of them and that they were scared when father and Traci had a fight and the police were called. D. said father and Traci were yelling and pushing each other. Both children were afraid because father left them with Traci a lot, and they did not want to go to father's home because there was a lot of fighting there. At the recent TDM meeting, father was very angry, had outbursts, and called her a "lying old woman." After a recent court hearing, father told maternal grandmother, "Things were going to get f'ing dirty now." Maternal grandmother had always been afraid of father, and he had threatened her in the past.

CSW Tha Yun testified he had been assigned to the case for a year or a year-and-a-half. Yun confirmed he had discussed with the children their concerns about their visits with father, including their fear of Traci. Yun verified he had told father previously that the children were not to be left alone with Traci or paternal grandmother. During the recent TDM meeting, father continued to be defiant, violent, angry and disrespectful. Father screamed and yelled at maternal grandmother that she was a liar. The facilitator twice reminded father that he had to respect the rules and not yell. Yun's interactions with father caused him concern, including the many occasions when father had cursed at him. Yun detailed the last occasion in his report because of the extensive length of time father had cursed at him. Father had threatened Yun, and Yun was concerned for his own safety. Those interactions occurred after father had completed his anger management program.

Yun stated the children loved father, but at times they said they did not want to visit overnight with him or live with him. When Yun asked father to give up one of his weekend visits so the children could visit their half-siblings, father refused and cursed at him.

b. Father's Witnesses

Father's neighbor Arthur testified he was outside his apartment during the incident between father and his girlfriend. Father had asked his girlfriend to move out, and she went outside and was going crazy and causing havoc. Arthur had never seen father physically assault his girlfriend. Arthur was also present during the incident between father and Traci. The altercation was actually between Traci and another neighbor, and father was trying to keep the peace and get Traci back inside her apartment. The children were inside their apartment.

Traci confirmed she was present during the incident between father and his girlfriend, which was a misunderstanding, and no domestic violence was involved. The girlfriend appeared to be intoxicated. Father and the girlfriend were just arguing, and he did not physically attack or block her. Regarding the incident between herself and father, Traci was arguing with a neighbor, and father tried to keep her from going out of the gate to get to the neighbor. Father did not yell or scream at her, and the police were not called. The children were outside playing in the yard, but if they had been paying attention, they could have seen her.

Paternal grandmother testified she was present during the incident between father and his girlfriend, but the children were not there. Father told his girlfriend she had to leave and started putting her things outside, and she started "going cuckoo," calling him names and throwing soda water at him. Paternal grandmother was also present during the incident involving father and Traci. The children were first outside in the courtyard and then they ran into the house and told her, "'daddy's hollering at Traci.'" The courtyard was not big, and if Traci was arguing with the neighbor, the children were not far away. Traci was arguing with a girl that lived over the fence, and father "was hollering at Traci telling her she needs to leave that girl alone." The police arrived and went to Traci's apartment.

c. Argument and Ruling

The children's attorney was most concerned about father's apparent lack of benefit from his anger management program and continued anger management problem and argued against returning the children to father's custody.

Father's attorney argued the Department had failed to meet its burden of showing a substantial risk, reasoning the incidents cited by the CSW did not show a substantial risk to the children and the children's statements about not wanting to visit or live with father did not support terminating services. Counsel further argued that the CSW's statement about father's angry outbursts was one-sided and the CSW never provided details about what he might have said "to insight [sic] this angry response" and that any reaction by father was "due to the rightful belief that the social worker is trying to prevent the father from regaining custody of his children," and the CSW was "clearly biased" against father. Counsel complained he was not allowed to call witnesses to rebut the allegation father left the children with Traci.

The court found father's drug testing sufficient and stated it did not believe father was using drugs. The court agreed father had unresolved anger management issues, noting, "Anger is not an excuse for the way you've spoken to the social worker," and your "decision to intervene in someone else's situation, [which] perhaps come from a good instinct of trying to prevent . . . further harm and conflict, just got you embroiled in a conflict that frighten your children." The court stated it did not allow father to recall Traci because it had determined she was "completely unbelievable" and "biased." The court found paternal grandmother had contradicted Traci's testimony about the intensity of Traci's argument with father and the children's exposure to it and whether the police had arrived.

The court found that because father did not have his anger under control, it could not order the children returned to his custody. The court stated visits did not pose a risk, but it was uneasy about father having overnight visits in light of his decision to leave the

children with Traci and paternal grandmother after being instructed not to do so. The court modified father's visits from overnights to unmonitored day visits. The court explained to father that before it changed any of its orders, it would need for him to do some anger management work. Father responded, "That's not a problem." The court also explained father needed to act differently towards the CSW and not leave the children with unapproved adults.

The court found by a preponderance of the evidence that return of the children to father's custody would create a substantial risk of detriment. The court found by clear and convincing evidence that although father had completed his court-ordered programs, his progress toward alleviating the causes that necessitated the children's removal remained partial. The court terminated father's reunification services.

Father filed a timely notice of appeal from the order terminating his reunification services and restricting him to unmonitored day visits.

DISCUSSION

Father contends the evidence was insufficient to support the court's finding the children could not safely be returned to his custody.

"The social worker has the burden of establishing detriment. The standard for showing detriment is 'a fairly high one. It cannot mean merely that the parent in question is less than ideal, did not benefit from the reunification services as much as we might have hoped, or seems less capable than an available foster parent or other family member.' Rather, the risk of detriment must be substantial, such that returning a child to parental custody represents some danger to the child's physical or emotional well-being. [¶] In evaluating detriment, the juvenile court must consider the extent to which the parent participated in reunification services. The court must also consider the efforts or progress the parent has made toward eliminating the conditions that led to the child's out-of-home placement. [¶] This court views the record to determine whether substantial evidence supports the court's finding [the children] would be at substantial risk of

detriment if returned to [father's] custody.” (Citations & italics omitted.) (*In re Yvonne W.* (2008) 165 Cal.App.4th 1394, 1400-1401; § 366.22, subd. (a).)

The court found return of the children to father's custody would create a substantial risk of detriment. The basis of the court's ruling was that father had unresolved anger issues. The court also expressed concern father had left the children with Traci and paternal grandmother even though he had been directed not to do so by the CSW because of their criminal records.

Father argues his anger is not a sufficient basis as it was not directed at the children, his anger at the CSW was understandable, and if the court felt the children's safety was in jeopardy, it would not have reinstated his overnight visits with them. Father suggests he was trying to defuse the situation with Traci and he was not the aggressor with his girlfriend. Father asserts domestic violence is no longer an issue and has been ameliorated as he addressed it in his domestic violence program (he completed a 10-week program and received a favorable letter from its director).

Father attempts to justify his outburst at the TDM meeting as “an isolated occurrence and not directed towards the children.” The record is replete with instances of father's inability to control his temper against several different people and at various times throughout the dependency proceedings.

Although it is true that father had completed two domestic violence programs, as noted by the Department, father was not able to use the skills he should have learned in those programs. Domestic violence was the core reason for the dependency. Thus, the fact father did not direct his anger at the children is not the critical question; the problem is father's inability to control his anger towards others. The two incidents with his girlfriend and Traci were only the latest examples of a pattern of father's ongoing inability to control his anger. Even more critical was the anger he expressed to those with some responsibility for the children -- maternal grandmother, foster mother, the CSW and the facilitator of the TDM meetings.

At the time the petition was filed due to an incident of domestic violence between father and mother, the maternal grandmother expressed concern father was a very violent and angry person who had threatened to kill mother; she reported the children had been having nightmares due to the most recent incident of domestic violence. Mother got a permanent restraining order against father in May. At a TDM in June, father yelled at maternal grandmother; the children were upset by father's yelling. Foster mother reported father was hostile, profusely angry and irrational during the meeting, directing his anger towards her, maternal grandmother and the facilitator.

When the CSW suspended father's visits, during a telephone call, father became very angry, refused to calm down and extensively cursed at the CSW. Subsequently, father continued to exhibit volatile and violent behavior. On at least five occasions, father yelled, cursed, and threatened the CSW. Foster mother said that on two or three occasions, father yelled at her and was very irate when he spoke to her on the phone.

Father had been involved in two incidents of domestic violence. One was with his girlfriend in April. Even if that incident is discounted as the evidence about it was conflicting and the children were not present, in October, father was involved in an argument with Traci. Though father claimed he intervened in the argument between Traci and another resident to defuse the situation, he admitted he yelled at her during the confrontation. Paternal grandmother testified the children ran into the house and told her father was "hollering at Traci." The children were frightened by the incident with Traci. This incident as well as some of the conflict with the CSW occurred after father had completed his anger management class in June.

Throughout the proceedings, father insisted he did not understand why he had to do court-ordered programs as he was the victim. Father had submitted to the jurisdiction of the court on the basis both parents had engaged in confrontations with each other in front of the children. The children stated they were afraid of father when he yelled and screamed and they did not want to go to his home because there was a lot of fighting

there. At times, they stated they did not want to live with him or have overnight visits with him.

In addition, father had left the children with paternal grandmother and Traci on two or three occasions each even though he had been told not to leave the children with them because of their respective criminal records. The children were afraid of Traci who had tried to hit them a few times and threatened to kill them if they did not listen to her.

Appellant argues his situation is similar to those in *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322 and *In re Yvonne W.*, *supra*, 165 Cal.App.4th 1394, in which the appellate courts determined a parent's problems were not serious enough to warrant continued out-of-home placement. However, in *Jennifer A.*, the court noted the mother had made substantive progress and was in general compliance with the case plan. (*Jennifer A. v. Superior Court*, *supra*, 117 Cal.App.4th at pp. 1344-1345.) In *Yvonne W.*, even though the mother had completed her case plan, the trial court found placing the child with mother in a shelter created a risk of detriment, the appellate court determined there was no evidence the child would suffer detriment from living in the shelter. (*In re Yvonne W.*, *supra*, 165 Cal.App.4th at pp. 1401-1402.)

Father notes he had been employed full time for at least two years, his living conditions were determined to be appropriate, he was appropriate with the children, there was no evidence he abused the children or had a mental illness or physical impairment affecting his parent skills or abused alcohol or drugs. However, it is the continuing nature of father's inability to control his temper or accept his part in the responsibility for domestic violence that supports the court's finding that return of the children to his custody would create a substantial risk. Thus, although father had completed two anger management classes, as found by the court, he had made only partial progress in solving the problem which led to the children's detention. (See *In re Dustin R.* (1997) 54 Cal.App.4th 1131, 1141-1143; *In re Erika W.* (1994) 28 Cal.App.4th 470, 477.) The fact the court was willing to allow father's visits to be unmonitored (but it changed them from overnights to day visits) does not negate that finding, especially as the court stated visits

did not pose a risk. The court indicated it would change its order if father complied with more anger management and did not leave the children with unapproved adults.

The Department suggests the issue on appeal is whether the court properly exercised its discretion when it terminated father's reunification services and, citing *In re Gabriel L.* (2009) 172 Cal.App.4th 644, states the court had discretion under section 364 to terminate father's services.³ Moreover, father had had 18 months of reunification services, which is the statutory maximum allowed unless extraordinary circumstances exist (see *Denny H. v. Superior Court* (2005) 131 Cal.App.4th 1501, 1509-1511), and there was no suggesting they did.

DISPOSITION

The order is affirmed.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.

³ Because the court held a section 366.22 hearing, we need not consider whether or to what extent *Gabriel L.* would apply or if we agree with its reasoning.